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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of VICTORIA DINKOVSKI,
Deceased.

STEVEN IVANOV, Individually and as
Trustee, etc.,

Petitioner and Respondent,

v.

DESSISLAVA STOEVA, as Trustee, etc.,

Objector and Appellant.

D051939

(Super. Ct. Nos. P186545, P187882)

APPEAL from a judgment of the Superior Court of San Diego County,

Richard E. L. Strauss and William H. Kronenberg, Jr., Judges. Affirmed.

In this dispute between the respective trustees of spousal trusts, the trial court determined the trustee of the wife's trust, respondent Steven Ivanov (Steven), was entitled to recover \$241,732.02 from the trustee of the husband's trust, appellant Dessislava Stoeva (Dessislava). The trial court found that more than \$200,000 had been erroneously

paid to the husband's trust following the close of escrow on the sale of property owned by the wife's trust. The trial court rejected claims by Dessislava that transfers from the husband's trust to the wife's trust were caused by any undue influence.

Dessislava's principal contention on appeal is that the trial court failed to give sufficient weight to declarations from the wife with respect to alleged elder abuse committed by her son Steven and his wife Penny Ivanov (Penny). Although Steven objected to admission of the declarations on relevancy grounds, the trial court in fact admitted the abuse allegation declarations into evidence, as well as declarations Steven and his wife submitted to adult protective service representatives in which they flatly denied the wife's allegations. In light of the disputed nature of the abuse allegations, the fact that they concerned alleged abuse of the wife, rather than the husband, and were made after the transactions between the wife and the husband which were the subject of the parties' dispute, the trial court was justified in considering other more direct evidence with respect to Dessislava's contention that the husband had been subject to undue influence at the time he executed documents which transferred assets to the wife and reflected payments to him by the wife.

We find no abuse of discretion in the trial court's refusal to permit Dessislava to offer testimony from a medical doctor with respect to the husband's physical condition shortly before his death. The doctor's testimony would not be relevant but for his expertise, even if only offered to impeach the testimony of a notary who witnessed the husband's signature at or near the time of his death. Moreover, the doctor's testimony

was only offered to impeach the notary with respect to a transaction which was not in issue at trial, but occurred months after the transactions which were in dispute.

For much the same reason, the trial court properly prevented Dessislava from offering an undisclosed handwriting expert to contradict the testimony of the notary. The expert's testimony would not be relevant but for his expertise and thus he should have been disclosed prior to trial.

We find no abuse of discretion in the trial court's unwillingness to continue the trial so that Dessislava could produce a bank witness.

Finally, contrary to Dessislava's contention, we find no abuse of discretion in the trial court's order refusing to permit Dessislava to amend her complaint to add claims held by her not in her capacity as trustee of the husband's trust, but as personal representative of the husband's estate. Although an earlier representative of the husband's estate had made various creditor's claims against the wife's *estate*, no claims by the husband's estate had been ever been asserted against the wife's trust or against Steven personally. Given these circumstances, the trial court could properly determine that an amendment adding the estate's claims against the wife's trust and Steven at the time trial was unduly prejudicial.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Boris & Victoria's Trusts*

Boris Dinkovski (Boris) emigrated from Bulgaria to the United States in 1964. Boris had been married in Bulgaria and had one daughter, Ivanka. Ivanka did not emigrate with her father but stayed in Bulgaria. After his arrival in the United States,

Boris met and married another Bulgarian émigré, Victoria Ivanov (Victoria). Victoria had also previously been married and had a son Steven. During the course of their lengthy marriage, Boris and Victoria acquired substantial personal and real property. Some of the property was acquired jointly and some as their respective separate property. In 1991 Victoria created a trust into which she placed a substantial amount of her property. Steven was the beneficiary of Victoria's trust. In 1992 Boris created a trust into which he placed a substantial amount of his property. Ivanka was the beneficiary of Boris's trust.

2. The Transfers

In March 2001 Boris's trust sold to Victoria a four-plex to which the trust held title. Victoria paid for the four-plex by giving Boris's trust a \$330,000 note secured by a deed of trust.

In October 2001 Victoria had a stroke and was no longer able to care for Boris, who was also in frail health. In early 2002 Boris and Victoria moved into a home where Steven and Penny attempted to provide care for them. Boris held title to the home, which was located on Avenida Sivrita in San Diego.

In March 2002 Boris and Victoria jointly held title to real property located on Avenida Feliz in San Diego. The Avenida Feliz property was not held by either trust. On March 7, 2002, Boris quitclaimed his interest in the Avenida Feliz property to Victoria.

On March 7, 2002, the Boris trust also quitclaimed to Victoria title to the home on Avenida Sivrita. However, the Avenida Sivrita quitclaim was not recorded.

In May 2002 Victoria sold the Avenida Feliz property to a third party and received \$380,000 in sales proceeds. Shortly after the sale of the Avenida Feliz property, \$214,000 in checks drawn on Victoria's account were given to Boris. The memo lines on the checks indicated the payments were for interest and principal on the four-plex note.

On May 16, 2002, the Boris trust gave Victoria a grant deed to their home on Avenida Sivrita and the grant deed was recorded. The grant deed was notarized by a notary who had done previous work for Boris and Victoria.

On June 24, 2002, Boris signed a receipt for \$200,000 in principal payments Victoria had made on the four-plex note and his signature was notarized by the same notary who had notarized the Avenida Sivrita grant deed.

In July 2002 Victoria and Steven disagreed about disposition of Victoria's money and property, and Victoria obtained a restraining order against Steven and Penny. In support of the restraining order, Victoria alleged that Steven and Penny had abused her; Steven and Penny vigorously disputed Victoria's abuse allegations.

3. Boris's Death

In August 2002 Boris was hospitalized. On August 12, 2002, while in the hospital, Boris signed a document which gave Steven and Penny's son Jordan Ivanov (Jordan) \$170,000. The gift was notarized by the same notary who had notarized the earlier documents. Boris died on August 15, 2002.

Shortly after Boris's death, a professional fiduciary, Julie Lubitz, was appointed personal representative of Boris's estate and successor trustee of his trust. Among other

matters, Lubitz reached a settlement with Jordan with respect to the \$170,000 gift he received from Boris.

In early 2004 Victoria's trust sold the four-plex to a third party and in March escrow closed on the sale. However, the escrow did not credit the Victoria trust with the \$200,000 in principal Victoria had paid Boris on the \$330,000 note in 2002. Instead, the escrow paid the Boris trust the entire \$330,000 in principal plus interest.

4. Victoria's Death

In April 2004 Victoria died. Steven was appointed personal representative of Victoria's estate and successor trustee of Victoria's trust.

Acting on behalf of Boris's estate, Lubitz made a creditor's claim in Victoria's estate in which she challenged the Avenida Feliz quitclaim.

In 2005 Steven discovered that the escrow on the four-plex sale had failed to credit his mother with the principal and interest payments she had made in 2002. Accordingly, acting as trustee of his mother's trust, in May 2005 Steven filed a petition in the probate court in which he alleged the Boris trust had improperly received \$200,000 as payment on the four-plex note.

After Steven filed his probate petition, Lubitz resigned as trustee of the Boris trust. Lubitz was replaced as trustee by Ivanka's daughter Dessislava. In August 2005 Dessislava, acting in the capacity of trustee only, responded to Steven's petition by filing a counter-petition in which she alleged the Boris trust's transfer of the Avenida Sivrita property was voidable because Boris lacked capacity and was subjected to undue influence. Dessislava, again acting solely as trustee, also asserted that Boris had been

improperly deprived of proceeds of the sale of the Avenida Feliz property, that Steven had unlawfully cashed checks on one of Boris's bank accounts, that Boris's probate estate had improperly paid expenses attributable to the Victoria trust, and that Boris had been the victim of elder abuse committed by Steven and Penny.

In his November 2005 response to Dessislava's claims, Steven asserted as an affirmative defense that, aside from the Avenida Sivrita claim, Dessislava did not have standing as trustee to assert any of her other claims. Steven alleged the additional claims were owned by Boris's probate estate and that Lubitz was still the representative of the probate estate.

Although Dessislava replaced Lubitz as personal representative of Boris's probate estate in April 2006, she made no attempt to assert any of the estate's claims against Steven before trial. Trial commenced in April 2007. The trial court granted Steven's motion in limine to limit trial to claims for which the respective trusts had standing. In response to the trial court's ruling, Dessislava moved to amend her petition to include claims of the estate against Victoria's trust and Steven. The trial court noted there were statute of limitation defenses to the estate's claims and denied the motion to amend.

With respect to Steven's claims, the trial court found the Boris trust had improperly received excessive payment from the four-plex escrow and entered judgment for Steven against Dessislava in the amount of \$241,000. With respect to Dessislava's claim that the Avenida Sivrita transfer was the result of undue influence, the trial court denied Dessislava's attempt to use undisclosed medical and handwriting experts to impeach the testimony of the notary that Boris had signed the grant deed knowingly and

voluntarily. Relying on testimony from the notary, Steven, Penny and Dessislava herself, the trial court found that Dessislava had failed to establish any undue influence or lack of capacity. Accordingly, the trial court denied Dessislava any relief on her claims.

DISCUSSION

I

In her principal argument on appeal, Dessislava contends the trial court failed to properly consider evidence of alleged abuse of Victoria by Steven and Penny. We find no error.

At trial, Dessislava was successful in offering into evidence, over relevancy objections asserted by Steven, declarations Victoria executed in July 2002 in support of her request for a restraining order against Steven and Penny. The declarations were executed on July 19, 2002, and in them Victoria alleged that after her stroke she had put Steven on her accounts so that he could assist her in managing her affairs and that when, earlier in July 2002 she had taken him off one of the accounts, Steven had become upset with her and struck her. Victoria also alleged that Penny had witnessed the assault but had interfered with Victoria's ability to summon police. Victoria also stated she believed Penny had stolen money from her and that she was afraid of Penny because Penny kept a handgun in her purse. In response to Victoria's abuse declarations, Steven offered and

the trial court accepted declarations he and Penny had executed in response to Victoria's declarations. In their declarations, Steven and Penny flatly denied Victoria's allegations.¹

In its statement of decision the trial court, without making any express reference to the abuse allegations, found that Boris was not subject to any undue influence at the time he gave Victoria the grant deed to the Avenida Sivrita property. Rather, the trial court relied on testimony from the notary, Steven, Penny and Dessislava to the effect that Boris was brusque and assertive and on evidence that Boris was very involved in his own financial affairs at or near the time he executed the Avenida Sivrita grant deed.

Contrary to Dessislava's argument on appeal, Victoria's declarations with respect to alleged abuse she suffered in July 2002 did not compel the trial court to determine that Boris was subject to undue influence when he executed the grant deed in May 2002.

" ' "The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator *at the very time the will was made.*" ' [Citation.]" [Citation.]" (Italics added.)

¹ In addition to Victoria's declarations, Dessislava also attempted to elicit testimony from an adult protective service supervisor. However, the supervisor refused to provide information from the file on the grounds that it was confidential. The trial court excused the supervisor, subject to recall, in the event Dessislava's counsel was able to convince the court that notwithstanding the supervisor's assertion of confidentiality, the trial court should instruct the supervisor to testify. Dessislava's counsel made no further attempt to elicit testimony from the supervisor. Dessislava did attempt to have statements from the adult protective services file admitted into evidence and Steven objected on, among other grounds, hearsay. The trial court sustained Steven's objection. On appeal Dessislava does not contend that the trial court erred in either requiring that she provide some basis upon which the court should direct that the supervisor testify or in refusing to admit hearsay statements from the adult protective services file.

(*Estate of Ferris* (1960) 185 Cal.App.2d 731, 734.) In light of this unchallenged principle, the trial court could, as it apparently did, place far more weight on evidence of Boris's mental state at the time the grant deed was executed, rather than the state of Victoria's relationship with her son and daughter-in-law some weeks later.

In this regard we think it bears emphasis that the trial court did not find that the abuse allegations were irrelevant to Dessislava's theory that Steven and Penny were pursuing a plan to shift property from Boris to Victoria and eventually to themselves; rather, the record shows that having admitted the declarations over a relevancy objection, the trial court simply found other, more direct evidence of Boris's mental state, more persuasive. In particular, we note that the trial court expressly relied on documentary evidence that "demonstrated that Boris was very much involved in his own financial affairs, purchasing annuities and engaging in numerous transfers of money from bank account to bank account." Under well-established principles governing our review of the trial court's factual findings, we are in no position to disturb the trial court's resolution of such conflicts in the evidence. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)²

² Although she did not raise the contention in the trial court, on appeal Dessislava contends for the first time that Steven and Penny had a confidential relationship with Boris and thus bore the burden of proof of the issue of undue influence. (See 14 Witkin, Summary of Cal. Law (10th ed.) Wills and Probate, § 135.) The existence of a confidential relationship sufficient to trigger a presumption of undue influence is usually a question of fact. (*Ibid.*) Since that factual issue was not litigated in the trial court, we are in no position to consider it on appeal.

II

Prior to trial, the parties complied with the provisions of Code of Civil Procedure section 2034 et seq. with respect to expert witnesses. In response to the date set for exchange of expert witnesses, both parties indicated they would not offer any expert testimony. In light of the failure of the parties to designate any experts at trial, the trial court excluded testimony from a handwriting expert and a medical doctor offered by Dessislava. In the trial court and again on appeal, Dessislava contends the testimony from the handwriting expert was needed to impeach the notary's testimony that Boris in fact voluntarily executed the Avenida Sivrita grant deed and that the doctor's testimony was needed to impeach the notary's testimony that, shortly before he died, Boris was able to understand that he was executing a gift to Jordan. We find no abuse of discretion.

There is no exception to the requirement that experts be designated before trial when, as here, the expert is going to be used to simply contradict an adversary's lay witnesses. (See generally *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 922-924.) Rather, the only impeachment exception to the designation requirement arises when an undesignated expert is offered to impeach another party's *expert* witness. (Code Civ. Proc., § 2034.310.) However, even this impeachment is limited: "This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion." (*Ibid.*) Here, the notary did not testify as an

expert but only as a percipient witness to execution of the disputed documents. Hence, he could not be impeached or otherwise contradicted by any undesignated expert.

Contrary to Dessislava's contention on appeal, the medical doctor she offered was offered as an expert. According to Dessislava, the doctor was needed to assist the court in understanding the meaning of the term "lethargic" which appeared in the nurse's notes as a description of Boris's condition on August 12, 2002, shortly before he executed the gift to Jordan. Thus, it was plainly the doctor's medical expertise and experience which made his proffered testimony relevant.

We also reject Dessislava's argument the trial court should have, in any event, admitted into evidence the underlying medical records with respect to Boris's condition at or near the time of his death. Initially, we question the probative value of medical records which described Boris's condition in August 2002, when he was in the hospital and near death, in determining whether he was subject to undue influence when, in May 2002, he executed the Avenida Sivrita grant deed. In any event as Steven points out, after the trial court excluded testimony from Dessislava's medical doctor, she never offered the medical records into evidence. Thus, the trial court cannot be faulted for failing to admit them. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

III

Next, Dessislava contends the trial court erred in failing to continue the trial to permit her to present evidence from an employee of Washington Mutual Savings and Loan (Washington Mutual). We find no abuse of discretion.

The record shows that in making payments on the four-plex note, Victoria gave Boris one check for \$150,000 which was deposited in an account at Washington Mutual. Dessislava advised the court the Washington Mutual employee would testify Boris did not have an account with Washington Mutual and that therefore \$150,000 of the \$200,000 Victoria had paid on the four-plex note had not in fact been received by Boris. However, Dessislava was unable to produce the employee by the time the trial court concluded taking evidence in the case, and the trial court declined to continue the trial to permit Dessislava to produce the bank employee.

We note that well before the close of evidence, the trial court advised the parties that it would conclude taking evidence on April 19, 2007. The record also shows that Dessislava did not put the bank employee on her trial witness list, but only offered the employee's testimony when the trial court sustained an objection to hearsay evidence with respect to whether Boris had a Washington Mutual account. It is also worth noting that the record contained evidence which showed that, notwithstanding Dessislava's argument, Boris had received interest income from Washington Mutual, and that on the same day Victoria made the \$150,000 payment to Boris, Boris used funds from a Washington Mutual account to purchase a \$100,000 annuity contract. Given these circumstances, the trial court could reasonably decline to continue the trial to permit Dessislava to present further evidence which was subject to contradiction by documents already in the record. "It is the duty of the trial court to vigorously insist upon cases being heard and decided in the most timely manner possible, unless there are compelling

reasons to the contrary." (*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.* (1988) 205 Cal.App.3d 442, 456.)

IV

Finally, we reject Dessislava's contention that the trial court erred in denying her motion to amend to add claims she held in her capacity as representative of Boris's probate estate.

As Steven points out, Dessislava does not dispute that she did not have standing as trustee of Boris's trust to assert claims which were owned by Boris's probate estate. Moreover, there is no dispute that well before the trial Dessislava was put on notice that she did not have standing as trustee to assert the claims owned by the estate. Thus in considering Dessislava's motion, the trial court could consider her lack of diligence in correcting the defect in her pleadings and the potential prejudice an amendment would cause Steven, who did not believe the estate's claims would be tried. (See *Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159 ["[A party] has a right to know his risk and weighs his exposure prior to trial"].)

More importantly however, contrary to Dessislava's contention, the estate's claims did not relate back to the time she filed her initial claims as trustee against Steven. "The general rule governing the permissibility of the bringing in of additional plaintiffs after the period of the statute of limitations has elapsed, or of the assertion of the defense of limitations against them, is that where the additional party plaintiff, joining in a suit brought before the statute of limitations has run against the original plaintiff, seeks to

enforce an independent right, the amended pleading does not relate back, so as to render substitution permissible or to preclude the defense of the statute of limitations.

[Citation.]" (*Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 533; accord, *Diliberti v. Stage Call Corp.* (1992) 4 Cal.App.4th 1468, 1471.) Here, the rights Dessislava wanted to add were clearly independent rights of the estate. The estate's claims concerned real property and tort claims in which the trust had no interest. Indeed, Dessislava conceded that as trustee she had no standing to assert the estate's rights, and we note that at the time Dessislava file her initial claims against Steven, Lubitz was still the estate's representative. Because the estate's claims assert independent rights which do not relate back, they were time barred when Dessislava, more than four years after Boris's death, sought leave to assert them. (Code Civ. Proc., §§ 337, 339, 366.2; Prob. Code, § 9353.)

In sum, the trial court acted well within its discretion in denying Dessislava's motion to add the estate's claims.

CONCLUSION

The documentary and evidentiary record here fully supports the trial court's determination that at the time of the disputed transfer of the Avenida Sivrita property, Boris was actively engaged in controlling both his trust and nontrust assets. In light of that evidence we are in no position to decide that Boris's will was overborn by Victoria, Steven, or Penny, notwithstanding the benefit they received as a result of the challenged transfer or any dispute which arose between them after the transfer occurred. (See *Estate of Ferris, supra*, 185 Cal.App.2d at p. 734.)

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.